COZEN O'CONNOR

June 7, 2013

David Y. Loh
Direct Phone 212-908-1202
Direct Fax 866-790-1914
dloh@cozen.com

VIA EMAIL (secretary@fmc.gov), (judges@fmc.gov)

Karen V. Gregory, Secretary
Office of the Secretary
Federal Maritime Commission
Room 1046
800 North Capitol Street, N.W.
Washington, D.C. 20573-0001

Re: Mitsui O.S.K. Lines, Ltd. v. Global Link Logistics, et al.
Federal Maritime Commission: Docket No. 09-01
Our file: 275609

Dear Ms. Gregory:

We are attorneys representing Complainant Mitsui O.S.K. Lines, Ltd. ("MOL") in the above captioned matter currently pending in the Federal Maritime Commission.

Please find enclosed an original and five (5) copies of Complainant's Opposition to CJR Respondents' Joinder in the Olympus Respondents' Motion to Strike and Response to the Rebuttal Proposed Findings of Fact submitted by Complainant.

A PDF copy of each pleading has been emailed to both secretary@fmc.gov and judges@fmc.gov.

Kindly arrange to stamp a conformed copy for our files. Our messenger has been instructed to wait.

If you have any questions, please do not hesitate to contact us.

We thank the Commission for its attention and courtesies, and remain,

Sincerely,

COZEN O'CONNOR

By: David Y. Loh

DYL/jmb
Enclosures

---

cc:

VIA EMAIL ONLY (w/ encls.)

David Street (dstreet@gkglaw.com)
Brendan Collins (bcollins@gkglaw.com)
GKG Law, PC
1054 31st St., Ste. 200
Washington, D.C. 20007

Ronald N. Cobert (rcobert@gjcobert.com)
Andrew M. Danas (adanas@gjcobert.com)
Grove, Jaskiewicz and Cobert LLP
1101 17th Street, N.W., Suite 609
Washington, D.C. 20036

Benjamin I. Fink (bfink@bfvlaw.com)
Neal F. Weinrich (nweinrich@bfvlaw.com)
Berman Fink Van Horn P.C.
3423 Piedmont Rd., NE, Suite 200
Atlanta, Georgia 30305

Warren L. Dean (wdean@thompsoncoburn.com)
Harvey Levin (hlevin@thompsoncoburn.com)
C. Jonathan Benner (jbenner@thompsoncoburn.com)
Kathleen E. Kraft (kkraft@thompsoncoburn.com)
Thomson Coburn LLP
1909 K St., N.W., Ste. 600
Washington, D.C. 20006

Andrew G. Gordon (agordon@paulweiss.com)
Paul Weiss Rifkind Wharton & Garrison LLP
1285 Avenue of the Americas
New York, NY 10019-6064

CC: OS
OGC
MUS(?)
Pub

BEFORE THE
FEDERAL MARITIME COMMISSION

RECEIVED
2013 JUN -7 PM 3:29
OFFICE OF THE SECRETARY
FEDERAL MARITIME COMM

ORIGINAL

Docket No. 09 -01

MITSUI O.S.K. LINES LTD.

COMPLAINANT

v.

GLOBAL LINK LOGISTICS, INC., OLYMPUS PARTNERS, OLYMPUS GROWTH FUND III, L.P., OLYMPUS EXECUTIVE FUND, L.P., LOUIS J. MISCHIANTI, DAVID CARDENAS, KEITH HEFFERNAN, CJR WORLD ENTERPRISES, INC. AND CHAD J. ROSENBERG

RESPONDENTS

COMPLAINANT'S OPPOSITION TO CJR RESPONDENTS' JOINDER IN THE OLYMPUS RESPONDENTS' MOTION TO STRIKE AND RESPONSE TO THE REBUTTAL PROPOSED FINDINGS OF FACT SUBMITTED BY COMPLAINANT

Complainant Mitsui O.S.K. Lines, Ltd. ("Complainant" or "MOL") hereby opposes CJR Respondents' Joinder in the Olympus Respondents' Motion to Strike and Response to the Rebuttal Proposed Findings of Fact Submitted by Complainant Mitsui O.S.K. Lines, Ltd. ("Joinder"). For the reasons set forth below, the Joinder should be denied.

CJR RESPONDENTS FAIL TO COMPLY WITH APPLICABLE LEGAL STANDARD

On May 31, 2013, MOL filed and served Complainant's Opposition to Olympus Respondents' Motion for Leave to Strike Allegedly False Statements in Complainant's Reply Brief in Further Support of its Claims against Respondents. In this opposition, MOL explained in detail how Olympus Respondents' Motion to Strike failed to comply with Fed. R. Civ. Pro.

Rule 12(f). MOL hereby incorporates by reference all of the arguments set forth in its opposition to Olympus Respondents' Motion to Strike, and—for the sake of brevity—will not repeat them here. CJR Respondents' Joinder, like the Olympus Respondents' Motion to Strike, also makes no attempt to comply with Rule 12(f). For this reason alone the Joinder should be denied.

Assuming *arguendo* that the CJR Respondents' Joinder is considered further, as more fully discussed below, the Joinder is devoid of merit.

MOL HAS NOT CHANGED ITS THEORY OF THE CASE

MOL has consistently taken the position that it had no prior knowledge of "split routing" until one of its employees, Paul McClintock, was served with a subpoena in August of 2008 by Jeffery Bushofsky ("Bushofsky"), counsel for Global Link Logistics, a claimant in the AAA Arbitration against the Olympus Respondents and CJR Respondents. MOL's position has never changed . MOL contends it was the victim of a massive and complex fraud known as "split routing" (*see* MOL's Opening Submission dated January 11, 2013 at PFF 51-82) which involved the deliberate mis-booking of intermodal shipments and the issuance of multiple false transportation documents to obtain lower rates in violation of the Shipping Act.

Before MOL commenced this proceeding in May of 2009 it conducted an internal investigation to determine, among other things, whether any MOL personnel had any knowledge of the "split routing" scheme. As part of this investigation, MOL interviewed two employees, Paul McClintock and Rebecca Yang. MOL interviewed McClintock and Yang because, according to Bushofsky, it had been alleged in the above-referenced arbitration proceeding that McClintock and Yang had knowledge of and/or were otherwise involved with "split routing." During their interviews, both McClintock and Yang vigorously denied any knowledge of or participation with "split routing." *See* Declaration of Kevin J. Hartmann dated February 17,

2012 (MOL Exh. BM, MOL App. 1634-38). As demonstrated by their deposition testimony in this case, to this day, both McClintock and Yang continue to deny any knowledge or involvement with "split routing." *See* Yang Dep. at 84:2-21 and 84:22-85:21 (GLL App. 0043) and McClintock Dep. at 104:22-105:2; 234:3-11; 305:19-306:6 and 235:9-237:19 (MOL App. 2008, 2009 and 2014-15). In fact, they both testified that they had never even heard of "split routing" before MOL's investigation. *See* Yang Dep. at 14:4-9 (MOL App. 2019) and McClintock Dep. at 104:16-105:2 (MOL App. 2008).

Subsequent to McClintock's deposition, MOL produced to the ALJ and the Respondents email messages MOL found that were in conflict with McClintock's sworn testimony. Accordingly, MOL sought to re-depose McClintock so that he could be questioned about the messages. *See* Complainant's Motion for Leave to Subpoena and Re-depose Non-Party Witness Paul McClintock dated November 23, 2012. Respondents opposed the application. *See* Global Link Logistics, Inc.'s Opposition to Mitsui O.S.K. Lines Ltd. Motion for Leave to Subpoena and Re-Depose Non-Party Witness Paul McClintock dated December 1, 2012 and Olympus Respondents' Opposition to MOL's Motion for Leave to Subpoena and Re-Depose Non-Party Witness Paul McClintock dated December 1, 2012.[1] Respondents were obviously satisfied with leaving the record incomplete and the ALJ ultimately denied MOL's application.

In its Opening Submission, MOL set forth it prima facie case with regard to the unlawful "split routing" scheme. MOL claimed that Respondents deliberately concealed "split routing" (MOL's Opening Submission dated January 11, 2013 at PFF 83-110 and 151-57) and Respondents knew "split routing" was illegal (MOL PFF 126-31). Consistent with its Amended Complaint (MOL Exh. F), MOL demonstrated that it was the victim of a fraudulent practice and that the company had no knowledge of the "split routing" scheme until the 2008 subpoena to

[1] CJR Respondents never formally opposed MOL's motion for leave to subpoena and re-depose Paul McClintock.

McClintock. *See* Declaration of Kevin J. Hartmann dated February 17, 2012 (MOL Exh. BM) and Declaration of Thomas W. Kelly dated January 18, 2013 (MOL Exh. CB).

In their reply papers, Respondents argued that both McClintock and Yang knew about "split routing" and even encouraged the practice at MOL. Respondents contended that such knowledge precluded MOLfrom pursuing its complaint against them. *See, e.g.*, CJR Respondents' Brief in Response to the Opening Submission of MOL dated March 1, 2013 at page 13, PFF 58, 59 and page 23, PFF 99.

In its response to Respondents' reply papers, MOL has shown how the Respondents—McClintock and Yang included—hid the scheme. That MOL was repeatedly lied to by McClintock and Yang does not change its theory of liability. MOL continues to maintain that until August of 2008 it had no knowledge of the fraudulent practice and that, consistent with well-established law, any knowledge of McClintock or Yang of "split routing" cannot be imputed to MOL. *See* Reply Brief of Complainant in Further Support of its Claims against Respondents dated May 1, 2013 ("MOL's Reply Brief") at pages 33-59. This position is entirely consistent with the record as developed by the parties.

The applicability of the "adverse interest" exception to this case was anticipated by CJR Respondents who specifically argued against application of this doctrine in their reply papers. *See* CJR Respondents' Brief in Response to the Opening Submission of MOL dated March 1, 2013 at page 49-50 and fn. 14. CJR Respondents argued the knowledge and bad acts of McClintock and Yang should be attributed to MOL. *Id.* at 48-50. However, as shown by the declarations submitted by Rosenberg and Briles, CJR Respondents agreed to keep "split routing" a secret from MOL. *See* Rosenberg Dec. at paragraphs 52-55 (CJR App. 009) and Briles Dec. at paragraphs 26-29 (CJR App. 016-17). As shown by their own reply papers, CJR Respondents

cannot legitimately argue prejudice; they were not surprised. To the contrary, it was MOL that was surprised with evidence showing McClintock and Yang helped Respondents carry out their scheme.

CJR Respondents have cited to a number of cases for the general proposition that introduction of new arguments can be dismissed as being untimely. All of the cited cases are easily distinguishable from the situation presented here. *Wheatley v. Wicomico Cnty., Md.*, 390 F.3d 328 (4th Cir. 2004) (plaintiff's new theory of liability was dismissed because it was introduced after completion of trial, and just before the judge was to enter judgment); *Carr v. Gillis Assoc. Indus., Inc* , 227 F.Appx. 172 (3rd Cir. 2007) (addendum written by plaintiff's expert witness was ignored by trial judge because it was introduced for the first time as part of plaintiff's opposition to defendant's motion for summary judgment and after the completion of expert discovery); *Speziale v. Bethlehem Area Sch. Dist.*, 266 F.Supp.2d 366 (E.D.Pa. 2003) (plaintiff's arguments seeking to amend its complaint were ignored by trial judge because they were contained within its opposition to defendant's motion for summary judgment); *OTA Limited Partnership v. Forceenergy, Inc.*, 237 F.Supp.2d 558, 561 n.3 (E.D.Pa. 2002) (district judge did consider plaintiff's new argument as being late, but not before also determining there was no factual support in the record for the proposition advanced by plaintiff); *Dux Capital Mgmt. v. Chen*, 2004 WL 1936309 at fn. 2 (N.D.Cal. 2004), *aff'd sub nom., Davis v. Yageo Corp.*, 481 F.3d 661 (9th Cir. 2007) (district judge denied a new argument advanced by plaintiff at oral argument because it had never been raised in its motion papers). Each of these cases involves reliance on an entirely new theory or new evidence. That is a far cry from MOL's rebuttal of Respondents' defense to MOL's allegations that split routing is a fraudulent practice. Such a rebuttal, based on extensive case support, is entirely appropriate and proper.

Respondents' main defense to MOL's complaint is that, since McClintock and Yang, knew about "split routing," and even encouraged the practice, Respondents should not be held responsible for "split routing." In response, MOL has simply acknowledged the weight of evidence in comparison with the repeated denials offered by both McClintock and Yang, and argued that McClintock's and Yang's knowledge cannot be imputed to MOL pursuant to the "adverse interest" exception. MOL has introduced no new facts into the record in support of its theory of liability against Respondents. MOL's argument is entirely consistent with the record before the ALJ, and is in direct rebuttal to the defenses presented by Respondents. There is nothing new or surprising to this rebuttal. CJR Respondents have not been prejudiced, especially since the testimony of their own witnesses strongly corroborates MOL's position and since they previously briefed the "adverse interest" exception.

It cannot be emphasized enough that, unlike the Respondents, MOL had no clear indication that McClintock and Yang were acting directly contrary to the interests of their own company. While repeatedly and consistently denying their knowledge and involvement with "split routing," McClintock and Yang were in fact cooperating with Global Link's "split routing" scheme to the detriment of MOL. The only subterfuge in this case has been that of the Respondents, who conspired with McClintock and Yang to hide the scheme from MOL. Now that this conspiracy has been exposed, the Respondents are crying foul. Indeed, as noted above, MOL moved to re-depose McClintock in order to obtain as full an understanding of his knowledge of and alleged participation in the split routing scheme as possible. Respondents' objections to MOL's arguments regarding the knowledge of McClintock and Yang, especially in light of their opposition to MOL's motion for a further deposition of McClintock, ring hollow and should be rejected.

Contrary to the representations of Respondents , MOL did not benefit from Global Link's business. For the reasons set forth in its Reply Brief, McClintock and Yang caused MOL to incur substantial damages and exposed MOL to significant civil penalties under the Shipping Act *See* MOL's Reply Brief at page 44-50.

A REPLY TO A REPLY IS PROHIBITED BY THE RULES

Sections B thru F of the Joinder are replies to MOL's Reply Papers dated May 1, 2013 and on their face are impermissible. Under the prior and current version of the Rules, the Joinder should be stricken as such. Rule 74 previously stated in relevant part: "a reply to a reply is prohibited." 46 C.F.R. Sec. 502.74(a)(1). *See Petition of Daniel F. Young, Inc. for Investigation of Panalpina, Inc. and Panalpina FMS, Inc.*, 1999 WL 361978, *4-5 (Commission 1999). Current rules continue to prohibit a reply to a reply. *See* Rule 62(b)(5) ("A reply to an answer may not be filed unless ordered by the presiding officer."); Rule 70(d) ("The non-moving party may not file any further reply unless requested by the Commission or presiding officer, or upon a showing of extraordinary circumstances.") and Rule 71(c) ("The moving party may not file a reply to a non-dispositive motion unless requested by the Commission or presiding officer, or upon a showing of extraordinary circumstances."). Since CJR Respondents have made no showing of extraordinary circumstances, the Joinder—especially Sections B thru F—should be stricken from the record.

Also, as a non-dispositive motion, the Joinder is subject to Rule 71(d) which limits the total number of pages to 10. Rule 71(d) states in relevant part: "Neither the motion nor the response may exceed 10 pages, excluding exhibits or appendices, without leave of the presiding

officer." In this case, the Joinder is a total of 21 pages, not including exhibits. By grossly exceeding the page limit, the Joinder should be stricken from the record.[2]

CONCLUSION

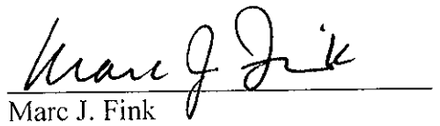
The Joinder does not meet the legal standards applicable to such motions under the FRCP Rule 12(f). The CJR Respondents' have not even argued, much less demonstrated how the matter they seek to strike is redundant, immaterial, impertinent or scandalous. Moreover, the allegations of prejudice on the part of CJR Respondents are without merit for the reasons set forth above. In light of the foregoing the Joinder, which appears to be a thinly disguised pretext for filing a reply to a reply, must be denied.

---

[2] If these sections of the Joinder are not stricken, MOL, who has the burden of proof, should be permitted to file a response. In any event, it should be noted that the FMC cases cited at pages 11 through 13 do not support the conclusion that the adverse interest exception is not applicable herein. None of these cases pertain to a situation where employees of a company cooperated and in effect conspired with another entity to the detriment of their employer. For example, in *Sea-Land Service, Inc – Possible Violations of Sections 10(b)(1), 10(b)(4) and 19(d) of the Shipping Act of 1984*, 30 SRR 872 (2006), Sea-Land was found to be liable for the conduct of various of its employees in promoting unlawful equipment substitution. 30 SRR at 882-888. This is not surprising or unusual; companies act through and are ordinarily responsible for the conduct of their employees. However, where, as here, employees act contrary to the interests of their employer and conspire with others to keep their conduct a secret from their employer, under the adverse interest exception, the employees knowledge is not imputed to the employer. MOL's Reply Brief at pages 33-59. The Commission's decision in *Pacific Champion Express Co., Ltd. – Possible Violations of Section 10(b)(1) of the Shipping Act of 1984*, 28 SRR 1397 (2000) similarly stands for the general principle that a company is ordinarily responsible for the actions of its agents. The Commission recognized that imputation of the agent's knowledge was not appropriate and the principle may not be responsible and liable where the violation was due to the fraud of the agent and a third party shipper (as is the situation in the case at bar). The Commission found that such a conclusion was not supported by the facts therein presented. 28 SRR at 1403

WHEREFORE, Complainant Mitsui O.S.K. Lines, Ltd. respectfully requests that the Joinder be denied.

Respectfully submitted,



Marc J. Fink
COZEN O'CONNOR
1627 I Street, N.W., Suite 1100
Washington, D.C. 20006
(202) 912-4800 (tel)
(202) 912-4830 (fax)

David Y. Loh
COZEN O'CONNOR
45 Broadway Atrium, Suite 1600
New York, NY 10006-3792
Tel: (212) 509-9400
Fax: (212) 509-9492

Attorneys for Mitsui O.S.K. Lines, Ltd.

Dated: June 7, 2013

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the following individual(s) via electronic mail:

David Street (dstreet@gkglaw.com)
Brendan Collins (bcollins@gkglaw.com)
GKG Law, PC
1054 31st Street, Ste. 200
Washington, D.C. 20007

Attorneys for Respondents Global Link Logistics, Inc.

Warren L. Dean (wdean@thompsoncoburn.com)
C. Jonathan Benner
(jbenner@thompsoncoburn.com
Harvey Levin (hlevin@thompsoncoburn.com)
Kathleen E. Kraft (kkraft@thompsoncoburn.com)
Thomson Coburn LLP
1909 K Street, N.W., Ste. 600
Washington, D.C. 20006

Andrew G. Gordon (agordon@paulweiss.com)
Paul Weiss Rifkind Wharton & Garrison LLP
1285 Avenue of the Americas
New York, NY 10019-6064

Attorneys for Respondents Olympus Partners, L.P.; Olympus Growth Fund III, L.P.; Olympus Executive Fund, L.P., Louis J. Mischianti; David Cardenas and Keith Hefferan

Ronald N. Cobert (rcobert@gjcobert.com)
Andrew M. Danas (adanas@gjcobert.com)
Grove, Jaskiewicz and Cobert LLP
1101 17th Street, N.W., Suite 609
Washington, D.C. 20036

Benjamin I. Fink (bfink@bfvlaw.com)
Neal F. Weinrich (nweinrich@bfvlaw.com)
Berman Fink Van Horn P.C.
3423 Piedmont Rd., NE, Suite 200
Atlanta, Georgia 30305

Attorneys for Respondents CJR World Enterprises, Inc. and Chad Rosenberg

David Y. Loh
Cozen O'Connor
45 Broadway Atrium, Suite 1600
New York, NY 10006-3792
Tel: (212) 509-9400
Fax: (212) 509-9492
Attorneys for Complainant Mitsui O.S.K. Lines Ltd.